

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-4223-00
SDTillem

date:

to: District Director, Manhattan District
Walter Harris, Acting Field Director, Financial Services &
Healthcare
Attn: Heidi Busch, Technical Advisor

from: District Counsel, Manhattan District, New York

subject: RIC
I.R.C. § 855 Dividends Paid by RIC After Close of Taxable Year
Uniform Issue List # 855.00-00

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to the taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

This advice is subject to 10 day post review by the National Office. The issues presented herein were discussed with Roger Wade (CC:FIP:B3) and Peter Reilly (CC:PA:APJP:B3) of the National Office. Accordingly, we request that you do not act on this advice until we inform you of the National Office's comments, if any, about this advice.

Issue

Under what procedures may the IRS rule upon a Regulated Investment Company's ("RIC") request for an extension of time to make an election under § 855(a).

Conclusion

Requests for an extension of time to make I.R.C. § 855(a) elections are governed by § 301.9100 of the Procedure and Administration Regulations. Pursuant to Section 5 of Revenue Procedure 2000-1 (Jan. 3, 2000) the procedure for requesting an extension of time for making an election or other application for relief under § 301.9100 of the Procedure and Administration Regulations must be made by requesting a letter ruling from the National Office. Therefore, pursuant to Rev. Proc. 2000-1, the RIC must file a request for a private letter ruling requesting an extension of time under § 301.9100 of the Procedure and Administration Regulations to file elections under § 855(a) of the Internal Revenue Code.

Facts

The taxpayer is a Regulated Investment Company ("RIC") within the meaning of I.R.C. § 851. The taxpayer sent the Service a voluntary disclosure statement seeking an extension of time for it to make an election under I.R.C. § 855. The taxpayer identified itself as X in the voluntary disclosure statement. Accordingly, the facts as we understand them are based on the taxpayer's voluntary disclosure statement and are as follows:

1. X is a publicly traded closed end Regulated Investment Company.

2. X's federal income tax return for the taxable year [REDACTED] was due [REDACTED].

3. X intended to automatically extend the time to file its federal income tax return for the [REDACTED] taxable year from its original due date of [REDACTED] to [REDACTED].

4. X mailed the Automatic Extension Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return (the "Automatic Extension") on [REDACTED] to the Internal Revenue Service Center in Holtsville, New York.

5. During the week of [REDACTED], the U.S. Postal Service returned the envelope containing the Automatic Extension to X and

stamped the envelope "Return to Sender" indicating that the envelope needed an additional [REDACTED] of postage.

6. X sent a letter to the IRS Holtsville Service Center dated [REDACTED], explaining that the extension was originally mailed by the [REDACTED] deadline but was held at the Post Office for two months for insufficient postage. The Post Office notice and the original extension envelopes were sent with the letter to the IRS by express mail.

7. The IRS Holtsville Service Center sent a letter to X dated [REDACTED] stating that the IRS could not grant X's request for an extension of time to file its federal income tax return because the Form 7004, Automatic Extension, was not filed by its due date.

8. X intended, prior to the extended due date of [REDACTED], to declare a dividend of its [REDACTED] undistributed long term capital gains, and to pay such dividend prior to [REDACTED] such that the dividend would qualify as an IRC § 855 dividend.

9. X did not declare any dividends between [REDACTED] and [REDACTED].

10. X has also indicated that it is involved in a pending transaction that makes an expeditious resolution of this issue critical.

11. X is requesting an extension of time to timely declare dividends in accordance with I.R.C. § 855(a)(1) so it can then make the necessary I.R.C. § 855 election with its tax return.

12. X's representative, [REDACTED], sent Walter Harris, Acting Field Director, Financial Services & Healthcare, a letter dated [REDACTED], stating that it was within his power to resolve this issue. Attached to the letter was a draft letter that X proposed Walter Harris sign as a solution to this matter. The draft letter stated in part, that the I.R.S. will not assert in any examination of the [REDACTED] tax return of the RIC that the dividend does not qualify under I.R.C. § 855. A copy of the letter dated [REDACTED], and draft letter are attached.

Discussion and Conclusion

I.R.C. § 855(a) provides in pertinent part that, if a RIC:

(1) declares a dividend prior to the time prescribed by law for the filing of its return for a taxable year (including the period of any extension of time granted for filing such return), and

(2) distributes the amount of such dividend to shareholders in the 12-month period following the close of such taxable year and not later than the date of the first regular dividend payment made after such declaration,

(3) the amount so declared and distributed shall, to the extent the company elects in such return be considered as having been paid during such taxable year (except as otherwise provided).

Section 1.855-1(b)(1) of the Income Tax Regulations sets forth the method of making the election and provides that the election must be made in the return filed by the RIC for the taxable year.

Section 301.9100-1(a) of the Procedure and Administration Regulations provides, in part, that the Commissioner has discretion, upon good cause shown, to grant a reasonable extension of the time fixed by regulations or by a revenue ruling, a revenue procedure, a notice, or an announcement published in the Internal Revenue Bulletin for the making of an election or application for relief in respect of tax under all subtitles of the Internal Revenue Code except subtitles E, G, H and I, provided (1) the time for making such election or application is not expressly prescribed by statute; (2) request of the extension is filed with the Commissioner before the time fixed for making such election or application, or within such time thereafter as the Commissioner may consider reasonable under the circumstances; and (3) it is shown to the satisfaction of the Commissioner that the granting of the extension will not jeopardize the interests of the Government.

X is requesting an extension of time to timely declare dividends in accordance with I.R.C. § 855(a)(1), so it can then make the necessary I.R.C. § 855 election with its tax return. X's request requires that the IRS determine if it will grant X an extension of time to make an election under I.R.C. § 855(a). A decision to allow X an extension of time to timely declare dividends under I.R.C. § 855(a) without the corresponding decision to extend the time to make an election under I.R.C.

§ 855(a) would be pointless. Section 301.9100 of the Procedure and Administration Regulations provides that the Commissioner has discretion, upon good cause shown, to grant a reasonable extension of time to extend the time to make an I.R.C. § 855(a) election.

Pursuant to Section 5 of Revenue Procedure 2000-1 (Jan. 3, 2000) the procedure for requesting an extension of time for making an election for relief under § 301.9100 of the Procedure and Administration Regulations requires that the Service's National Office issue a letter ruling. In order to receive a private letter ruling, a taxpayer must file a written request for such ruling that includes all of the information set forth in section 8 of Revenue Procedure 2000-1. Accordingly, the taxpayer should request a letter ruling from the National Office pursuant to Revenue Procedure 2000-1.

A taxpayer may make a request for an expeditious handling of a letter ruling request pursuant to Section 8.02(4) of Revenue Procedure 2000-1. The request must explain the need for expeditious handling and be made in writing, preferably in a separate letter with, or soon after filing, the request for the letter ruling. X has indicated to the District that it is involved in a pending transaction that makes the resolution of this issue critical. We thus recommend that X seek an expedited letter ruling.

Revenue Procedure 92-85, 1992-2 C.B. 490, sets forth factors that the Internal Revenue Service generally will use to determine whether, under the facts and circumstances of each situation, good cause for granting an extension of time has been shown and the other requirements of § 301.9100-1 of the regulations have been met. Section 5 of Revenue Procedure 92-85 provides that relief will be granted when the taxpayer provides evidence to establish that (1) the taxpayer acted reasonably and in good faith, and (2) granting relief would not prejudice the interests of the government. Section 5.01 of Revenue Procedure 92-85 provides that when a taxpayer applies for relief before the failure to make the election was discovered by the Service, the taxpayer will be deemed to have acted reasonably and in good faith. Section 5.02 of Revenue Procedure 92-85 provides that the interests of the government will not be prejudiced if granting relief under the revenue procedure would not result in the taxpayer having a lower tax liability than if the taxpayer had made a timely election (taking into account the time value of money).

The IRS has previously issued Private Letter Rulings granting 9100 relief with respect to a RIC's failure to make

timely I.R.C. § 855 elections. For example, an extension of time was granted a RIC to make an election under I.R.C. § 855 where the RIC's accountant inadvertently filed an extension on September 11, 1997 that was due on June 16, 1997. Priv. Ltr. Rul. 9821005 (Feb. 2, 1998). In another case, an extension was granted to a Trust to make an election under I.R.C. § 855 when an advisor to the Trust did not timely file the Fund's 1120-RIC because of a mix up in assignments of new job responsibilities. Priv. Ltr. Rul. 9345016 (Aug. 11, 1993). Similar extensions were granted in Priv. Ltr. Rul. 9335053 (Jun. 9, 1993); Priv. Ltr. 9328027 (Apr. 19, 1993) and Priv. Ltr. 8921054 (Feb. 27, 1989).

However, in all of the above Private Letter Rulings it appears that the RIC declared the dividend prior to the original due date of its tax return. In the instant case, X's tax return was due on [REDACTED]. X did not declare any dividends by this date. In Rev. Rul. 76-176, 1976-1 C.B. 189, the IRS ruled that a real estate investment trust that did not timely file its return or receive an extension of time for filing could not under I.R.C. § 858(a) treat a dividend as having been paid during the prior taxable year. The trust's Federal income tax return for 1974 was due on or before March 17, 1975. On April 1, 1975, the trust filed an application for an automatic extension of time for filing its 1974 return and requested that the date of the application be made retroactive to the due date of the return. When it filed its 1974 return, the trust desired to elect under I.R.C. § 858(a) to treat a dividend declared on April 30, 1975, as having been paid during 1974. The request for an automatic extension was denied by the IRS pursuant to Treas. Reg. § 1.6081-3(a)(2) on the basis that the application for the automatic extension was not filed on or before the date prescribed for the filing of the return. The IRS concluded that since no extension of time was granted for the filing of the trust's return for 1974 and since the dividend declared on April 30, 1975, was not declared prior to the time prescribed by law for the filing of such return, the trust could not elect under I.R.C. 858(a) to treat the amount of such dividend as having been paid during 1974.

X alleges that it intended, prior to the extended due date of [REDACTED], to declare a dividend of its [REDACTED] undistributed long term capital gains, and to pay such dividend prior to [REDACTED] such that the dividend would qualify as an IRC § 855 dividend. X sent a letter to the IRS dated [REDACTED], explaining that the extension was originally mailed by the [REDACTED] deadline but was held at the Post Office for two months for insufficient postage. The Post Office notice and the original extension envelopes were sent with the letter to the IRS by express mail. X also applied for relief before the

failure to make the IRC § 855(a) election was discovered by the Service. Accordingly, it appears X would be deemed to have acted reasonably and in good faith pursuant to Revenue Procedure 92-85.

Based on our research, coupled with our discussions with Peter Reilly (CC:PA:APJP:B3) and Roger Wade (CC:FIP:B3) of the National Office, it is our understanding that there is no precedent for granting X the right to have the dividend be treated under I.R.C. § 855 for the [REDACTED] taxable year since X did not declare the I.R.C. § 855 dividend prior to the due date of its [REDACTED] return. However, this does not rule out the possibility that X could still be granted the relief it seeks, if X can demonstrate it has satisfied the applicable requirements set forth in § 301.9100 of the Procedure and Administration Regulations and Revenue Procedure 92-85. The determination of whether X can be granted relief should be made by the National Office based on a letter ruling request submitted by X.

X asserts that Walter Harris in his capacity as Acting Field Director has the authority to grant the RIC the right to timely declare dividends in accordance with I.R.C. § 855(a)(1). X also requests that he sign a letter stating in part, that the I.R.S. will not assert in any examination of the [REDACTED] tax return of the RIC that the dividend does not qualify under I.R.C. § 855. The taxpayer does not cite any authority for its position. Our research has also found no support for this position. Nor has the National Office found any support for this position. The taxpayer essentially wants the District to take action for which we believe there is no authority involving anticipated prospective events concerning an unfiled return and an unidentified taxpayer. In light of the above and based on our analysis involving § 301.9100 of the Procedure and Administration Regulations and Revenue Procedure 2000-1, we recommend that Mr. Harris not sign the proposed letter drafted by the taxpayer.

This advice is limited to the timeliness of X's election. No opinion is expressed regarding whether X is relieved from any penalty that it may owe as a result of its failure to timely file its federal income tax return.

If you have any questions regarding this memorandum, contact Attorney Steven Tillem at (212) 264-5473 extension 255. We remind you that this advice is subject to National office review and comments. Accordingly, we request that you do not act on this advice until we inform you of the National Office comments, if any. We have informed the National Office of the taxpayer's request for an expeditious response and will provide any assistance we can to this end.

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By: _____
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